No. 91-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENICE H. REIN, *et al.*,
Petitioners,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

DILIP JOSHI, *et al.*,
Petitioners,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

JAMES M. SHAUGHNESSY
ARTHUR E. HOFFMANN, JR.
WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, N.Y. 10019
(212) 237-1000

RICHARD M. SHARP *
FREDERICK C. SCHAFRICK
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Pan American World Airways, Inc.

* *Counsel of Record*

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QUESTIONS PRESENTED

1. Are punitive damages available in cases governed by the Warsaw Convention?

2. Does the cause of action created by the Warsaw Convention provide the exclusive remedy for the wrongful death or personal injury of passengers in cases governed by the Convention?

RULE 29.1 STATEMENT

Respondent Pan American World Airways, Inc., is a wholly-owned subsidiary of Pan Am Corporation and has the following subsidiaries and affiliates that are not wholly-owned by it or Pan Am Corporation: Aeronautical Radio, Inc.; Air Cargo, Inc.; Airline Tariff Publishing Co.; Escola Americana de Rio de Janeiro; Honolulu Fueling Facilities Corporation; International Aeradio (Caribbean) Ltd.; Liberian Development Corporation; Manhattan Air Terminal, Inc.; Nigerian Aviation Handling Co.; Pan Am Commercial Services, Inc.; Promotora de Hoteles de Turismo Medellin, S.A.; Social Immobiliaria Norteamericana, S.A.; and Societe International de Telecommunications Aeronatiques.

Pan Am Corporation and its subsidiaries are presently undergoing reorganization under the Bankruptcy Code. Under the terms of an agreement that has been approved by the bankruptcy court, but that is not yet implemented and is subject to certain contingencies, Delta Air Lines, Inc. will ultimately own 45% of the stock in a new corporation which will trade under the name of Pan American World Airways.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Pan American World Airways, Inc. ("Pan Am") respectfully prays that the petition for certiorari filed in these cases on behalf of plaintiffs be denied.[1]

STATEMENT OF THE CASE

These cases involve claims for wrongful death and personal injury against Pan Am that arise out of two international aviation accidents: the midair explosion of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, and the hijacking of Pan Am Flight 73 at the

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[1] Citation to the petition for certiorari will be to "Pet."; citation to the appendices to the petition will be to "Pet. App."

Karachi International Airport, Pakistan, on September 5, 1986. Because both accidents occurred in international aviation, they are governed by the Warsaw Convention.[2] As supplemented by the Montreal Agreement [3] for flights serving the United States, the Convention limits carrier liability for wrongful death or personal injury to $75,000 per passenger, except in cases where plaintiffs can establish that death or injury was caused by the "wilful misconduct" of the carrier or its agents.

On interlocutory appeals taken pursuant to 28 U.S.C. § 1292(b), the U.S. Court of Appeals for the Second Circuit held that punitive damages may not be recovered in a Warsaw case. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988 ("Lockerbie")*, 928 F.2d 1267 (2d Cir. 1991), Pet. App. at A1. That court also held that the Warsaw Convention is the exclusive cause of action for redress of a passenger's wrongful death or personal injury in international aviation accidents. After the Second Circuit issued its opinion, the District of Columbia Circuit also held that punitive damages may not be recovered under the Convention, but that Circuit explicitly found that it was unnecessary to decide whether the Warsaw Convention creates an exclusive cause of action. *In re Korean Air Lines Disaster of Sept. 1, 1983 ("KAL")*, 932 F.2d 1475, 1485-90 (D.C. Cir. 1991). A petition for certiorari has been filed by the plaintiffs in the *KAL* case (No. 91-251).

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note.

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Agreement CAB 18900, *approved*, CAB Order E-23680, 31 Fed. Reg. 7302 (1966), *reprinted at* 49 U.S.C. app. § 1502 note.

REASONS FOR DENYING THE WRIT

Introduction and Summary

Plaintiffs' petition lists three questions for review, but those questions boil down to two issues: (1) are punitive damages available in cases governed by the Warsaw Convention and (2) does the Warsaw Convention provide the exclusive cause of action for the wrongful death or personal injury of passengers in cases governed by it? On the first issue, as we show in Part I, three circuits have ruled that punitive damages may not be recovered under the Convention; and neither this Court nor any other circuit has reached a conflicting conclusion or result. The uniform rulings of the courts of appeals, moreover, are fully supported by the text, negotiating history, and purposes of the Warsaw Convention, as well as by the shared expectations of the parties to it. It also appears that no foreign court has rendered a reported decision indicating that punitive damages or any similar form of non-compensatory damages are recoverable under the Convention. Thus, the primary issue presented by petitioners does not merit review.

The secondary issue presented by petitioners—whether the cause of action created by the Convention is exclusive—does not control the question of whether punitive damages may be recovered. As we show in Part II, the Eleventh Circuit and the D.C. Circuit have held that punitive damages may not be recovered under the Convention while explicitly refraining from deciding the exclusivity issue. Furthermore, the ostensible conflict among the circuits over exclusivity is merely a conflict between a holding in the Second Circuit and earlier *dicta* from the Ninth Circuit. The Second Circuit's studied ruling is consistent with the Convention's text and history and with the practice of other contracting parties. Thus, review of the exclusivity issue is not warranted because that issue does not involve a genuine conflict in decisions of appellate

courts and resolution of the issue in a manner favorable to petitioners would not require reversal of the Second Circuit's ruling that punitive damages are not recoverable under the Convention.

I. THE DISMISSAL BY THE SECOND CIRCUIT OF PETITIONERS' CLAIMS FOR PUNITIVE DAMAGES IS SUPPORTED BY DECISIONS OF THE ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS; BY THE TEXT, NEGOTIATING HISTORY, AND PURPOSES OF THE WARSAW CONVENTION; AND BY THE SHARED EXPECTATIONS OF THE CONTRACTING PARTIES.

A. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits or of This Court.

There is no conflict among the decisions of the circuits or the highest State courts on whether punitive damages may be recovered in cases governed by the Warsaw Convention. Indeed, the only other appellate courts to have considered this question have concluded, as did the Second Circuit, that punitive damages may not be recovered in a case governed by the Warsaw Convention. *Floyd* v. *Eastern Airlines, Inc. ("Floyd I")*, 872 F.2d 1462, 1483-89 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *KAL*, 932 F.2d at 1485-90. Furthermore, no foreign tribunal appears to have published an opinion that suggests in any way that punitive damages or some similar form of non-compensatory damages is available under the Convention.

Petitioners, however, contend that the decision below "is in conflict with the *analysis* and *review* of punitive damages by this Court in *Haslip* as well as this Court's refusal to read a punitive damages bar into two constitutional amendments and two statutes." (Pet. at 9 (emphasis added)), citing *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257

(1989); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Smith* v. *Wade*, 461 U.S. 30 (1983). None of these decisions purports to construe the Warsaw Convention, and none of them remotely suggests that there is a provision in the Constitution that would invalidate a statute or policy, much less a treaty, that limits relief to compensatory damages. *See, e.g., Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) (punitive damages not recoverable for breach of duty of fair representation); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-66 (1981) (municipalities immune from punitive damages otherwise allowable under 42 U.S.C. § 1983).

In short, there is no conflict among the appellate courts of this country or among the courts of other signatory nations that would justify the invocation of this Court's discretionary jurisdiction.

B. The Court Below Correctly Dismissed Petitioners' Punitive Damages Claims.

The decisions of the Second, Eleventh, and District of Columbia Circuits on this question are not only uniform, but also correct. Those decisions show that the unusual purposes and effects of punitive damages in American law are inconsistent with the Convention's text and negotiating history and with the shared expectations and purposes of the contracting parties. Fundamentally, the inconsistency arises because the Convention was intended to provide reparation or compensation for breach of the contract of carriage, whereas "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Newport* v. *Fact Concerts, Inc.*, *supra*, 453 U.S. at 266-67. As a result, "punitive damages . . . are in effect a windfall to a fully compensated plaintiff." *Id.* at 267.[4]

[4] The law of New York, which plaintiffs contend should govern this question, likewise recognizes that punitive damages "are not

1. *Article 17.* As it appears in the official translation, Article 17 states:

> "The carrier shall be liable for *damage sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident which caused the damage so sustained* took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (emphasis added).

That is, the carrier is liable for "damage sustained" when the "accident" "caused the damage so sustained." The liability thus created is relief for "damage sustained," a term that does not encompass punitive damages because they are windfall recoveries and not "damage sustained" by the victim in an accident. *See Lockerbie*, 928 F.2d at 1280-81, Pet. App. at A31-A34; *accord, KAL*, 932 F.2d at 1485-86; *Floyd I*, 872 F.2d at 1486.

2. *Article 24.* Petitioners contend that Article 24 of the Convention preserves their right to seek punitive damages under state law.[5] Pet. at 26-27. As the court below

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intended to compensate the injured party but to punish the tortfeasor for his conduct and to deter him and others like him from similar action in the future . . . ." *Sharapata* v. *Town of Islip*, 56 N.Y.2d 332, 335, 452 N.Y.S.2d 347, 348, 437 N.E.2d 1104, 1105 (1982). Hence, those "damages are a windfall for the plaintiff who, by hypothesis, has been made whole by the award of compensatory damages." *Home Ins. Co.* v. *American Home Products Corp.*, 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 483, 550 N.E.2d 930, 932 (1990) (internal quotes omitted).

[5] Article 24 provides:

> "(1) In the cases covered by articles 18 and 19 [for damage to baggage or goods or for delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> "(2) In the cases covered by article 17 [for death or injury of a passenger] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the

recognized, however, Article 24 simply looks to local law (that is, non-international law) to determine who can sue for the death or injury of a passenger and what are the appropriate measures for compensatory relief. There is no indication in the Convention's negotiating history that Article 24 was intended to preserve a common-law right to punitive damages. *Lockerbie*, 928 F.2d at 1282-85, Pet. App. at A36-A43; *accord*, *KAL*, 932 F.2d at 1487-88. On the contrary, the Convention's reporter explained that the drafters intended that Article 24 would leave to local law only the question of "what are the damages subject to reparation."[6] As noted above, punitive damages represent a windfall recovery, and are thus not "reparation."[7]

3. *Article 25.* Article 25(1) of the Convention provides in part: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct . . . ." 49 Stat. 3020. Petitioners contend that, if Article 17 renders the carrier liable only for compensatory damages, it is a provision which "excludes or limits" liability for purposes of Article 25. They further assert that the "plain language [of Article 25] dictates that *any* exclusion or limitation of liability is lost to the carrier if the damage was caused by its wilful misconduct." Pet. at 23 (emphasis in original).

The courts of appeals have soundly rejected this argument and have instead held that Article 25's reference to provisions "which exclude or limit" liability was intended to refer to a small number of the Convention's provisions

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persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020.

[6] *Second International Conference on Private Aeronautical Law, Warsaw, 1929, Minutes*, at 255 (R. Horner & D. Legrez trans. 1975) ("Warsaw Minutes").

[7] *See Smith* v. *Wade*, *supra*, 461 U.S. at 85 (Rehnquist, J., dissenting): "[A]s the Court concedes, punitive damages are not 'reparation' or 'compensation' . . . ."

—in particular, Article 22 (which limits monetary recovery against a carrier) and Article 20 (which furnishes the carrier with certain defenses). *Lockerbie*, 928 F.2d at 1285-87, Pet. App. at A42-A47; *KAL*, 932 F.2d at 1488-89; *Floyd I*, 872 F.2d at 1483. Petitioners' argument that a finding of "wilful misconduct" renders inapplicable "any" provision that in some fashion limits or excludes carrier liability is, moreover, contrary to other decisions. Those decisions have held that Article 29, which requires that an action for damages be commenced within two years, and Article 26, which extinguishes a carrier's liability for damaged baggage or goods if a complaint is not made within seven days, continue to apply even though plaintiff alleges wilful misconduct.[8]

Finally, petitioners' plain language argument must also fail because, within the context of the Warsaw Convention, Article 17 is not a provision that excludes or limits liability. One drafting the Convention would have viewed Article 17 as a provision that *creates* liability. The fact that the liability created only encompasses liability for compensatory damages does not make Article 17 a limitation with the meaning of Article 25.[9] Thus, as the

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[8] With respect to Article 29, *see, e.g., Stone* v. *Mexicana Airlines, Inc.*, 610 F.2d 699 (10th Cir. 1979); *Molitch* v. *Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970); *Magnus Electronics, Inc.* v. *Royal Bank of Canada*, 611 F. Supp. 436 (N.D. Ill. 1985). As to Article 26, *see, e.g., Highlands Ins. Co.* v. *Trinidad & Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984); *Denby* v. *Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1144-48 (E.D.N.Y. 1983), *remanded on other grounds*, 737 F.2d 172 (2d Cir. 1984); *Hewlitt Knitting Mills, inc.* v. *Flying Tiger Line, Inc.*, 669 S.W.2d 412 (Tex. Ct. App. 1984).

The dissent in the *KAL* case failed to deal with this authority showing that Article 25 does not refer to every provision in the Convention that could be claimed in some respect to exclude or limit carrier liability. *See* 932 F.2d at 1493-94 (Mikva, C.J., dissenting).

[9] The decision below is not in any way inconsistent with *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). The issue in *Chan*

court below held, "unlimited liability" under Article 25 "mean[s] only unlimited *compensatory liability*." 928 F.2d at 1287, Pet. App. at A47 (emphasis added).

4. *Shared Expectations.* To determine the shared expectations of the parties to the Warsaw Convention, one must first look to French law, "because the Warsaw Convention was drafted in French by continental jurists." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). As the courts of appeals have recognized, an action under the Warsaw Convention sounds in contract under the French civil law, and in civil law countries like France, punitive damages are not available in contract actions or, for that matter, even in tort actions. *See Lockerbie*, 928 F.2d at 1281-82, Pet. App. at A34-A35; *KAL*, 932 F.2d at 1487; *Floyd I*, 872 F.2d at 1486. Petitioners do not dispute this conclusion, but rather emphasize that a delegation from a common law country, Great Britain, also participated in the conference that drafted the Convention,[10] and claim that punitive damages were available under English law. Pet. at 25. But, as noted, the Convention's drafters intended to create an action sounding in contract, and the intention was shared by the British delegation.[11] Punitive damages are not available in

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was governed by the clear and dispositive language of Article 3 of the Convention. Here, there is no clear and dispositive language showing that the restriction on punitive damages contained in Article 17 is lifted upon a finding of wilful misconduct under Article 25.

[10] The British delegation also represented Australia and the Union of South Africa. Warsaw Minutes at 7; 49 Stat. 3024. The United States only sent two observers to the Warsaw Conference, Warsaw Minutes at 10, and thus did not participate in the Convention's drafting.

[11] A British delegate, Orme Clarke, spoke against a proposal to allow the place of the accident to be one possible forum for bringing a liability action. Mr. Clarke said that "the place of the accident has nothing to do with the contract. . . . Ordinary contract law confers jurisdiction on the place where the contract was done, while the place where the accident occurs can have no relation to the

breach of contract actions in England,[12] and there is no showing that the English courts have ever awarded punitive damages in a Warsaw case.[13] Moreover, petitioners provide no reason why the civil law rule as to the non-availability of punitive damages should not govern this issue when the Convention was predominantly drafted by civil law jurists.

Petitioners criticize the court of appeals for "ascribing to Warsaw's drafters an intent to bar punitive damages because of their silence on the subject." Pet. at 25. But the Second Circuit found this silence telling because "there can be no doubt that had the question been raised it would have been hotly debated, especially since the concept is unique to the common law, and also because many of the airlines were state-owned." 928 F.2d at 1284, Pet. App. at A41.[14]

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contract." Warsaw Minutes at 113-14. This statement shows that the British delegate must have considered the Convention to be creating an action in contract, inasmuch as the place where the accident occurs would be a natural place to bring an action in tort.

[12] *See, e.g.*, H. Street, *Principles of the Law of Damages* 29 (1962).

Moreover, it would not have been clear in 1929 whether purely punitive (*i.e.*, non-compensatory) damages would have been available in tort actions in England. *See* C. McCormick, *Handbook on the Law of Damages*, § 78, at 278 (1935). This uncertainty was only settled 35 years later in *Rookes* v. *Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367, 410 (H.L.) (opinion of Lord Devlin).

[13] On the contrary, the House of Lords in *Fothergill* v. *Monarch Airlines, Ltd.*, [1981] A.C. 251, [1980] 2 All E.R. 696, 700 (H.L.), construed the French word "*dommage*" (damage) in Article 17 as meaning "monetary loss." Punitive damages are a windfall not encompassed within the concept of "monetary loss."

[14] The dissent in *KAL* suggested that the Convention might be analogized to workers' compensation statutes that "do not limit the availability of separate damage actions in cases of intentional misconduct by the employer." 932 F.2d at 1494. But there is no reason to think that the civil law jurists at the Warsaw Conference would have contemplated such an analogy to American law, and there is

5. *Purposes of the Convention.* Finally, the result reached below furthers the acknowledged purposes of the Warsaw Convention: "limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry" and "achieving uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd ("Floyd II")*, 111 S. Ct. 1489, 1499, 1502 (1991). *See Lockerbie*, 928 F.2d at 1287-88, Pet. App. at A48-A51; *accord*, *KAL*, 932 F.2d at 1489-90; *Floyd I*, 872 F.2d at 1488. Petitioners do not challenge this aspect of the ruling of the Second Circuit, and it provides strong, additional support to the conclusion that the decision below was correct.

In sum, the courts of appeals to date have unanimously held that punitive damages are not recoverable under the Warsaw Convention, and their decisions are faithful to the Convention's terms and negotiating history and to purposes and shared expectations of the contracting parties who were guided by civil law concepts of contract and compensatory damages.

II. THE SECOND CIRCUIT'S DETERMINATION THAT THE WARSAW CONVENTION IS THE EXCLUSIVE CAUSE OF ACTION DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners also seek review of the determination of the Second Circuit that the cause of action created by the Warsaw Convention for personal injury and wrongful death in international aviation accidents is exclusive. As we show below, there is no direct or genuine conflict among the appellate courts on this issue; and the Second Circuit's resolution of the issue conforms to the negotiating history of the Convention and the practice of other parties to the Convention. Furthermore, the exclusivity issue does not have the intrinsic importance that might

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no reason to believe that they ever contemplated awards of punitive damages against their air carriers, many of which were state-owned.

justify review; indeed, it is not even a necessary ingredient for affirming the Second Circuit's holding that punitive damages are not recoverable under the Convention, as the decisions of the Eleventh Circuit and the D.C. Circuit in *Floyd I* and *KAL* demonstrate.

A. There Is No Genuine Conflict Between the Decision of the Second Circuit in These Cases and the Decisions of This Court or Other Appellate Courts.

1. *Alleged Conflict with Other Appellate Decisions.* Petitioners contend that there is a split among the circuits on the question whether the cause of action created by the Convention is exclusive. Pet. at 12-13. The court below in this case and the Fifth Circuit have held that the Convention is exclusive. *See Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *appeal dismissed and cert. denied*, 469 U.S. 1186 (1985). Likewise in accord with the decision of the Second Circuit are a decision of the Alabama Supreme Court [15] and *dicta* from a decision of the Third Circuit.[16] For the alleged conflict, petitioners rely on what, as we show below, is *dicta* in three cases from the Ninth Circuit and *dicta* from one plainly outmoded decision of the Virginia Supreme Court (Pet. at 12-13 & n.8).[17]

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[15] *Newsome* v. *Trans International Airlines*, 492 So.2d 592, 599 (Ala.), *cert. denied*, 479 U.S. 950 (1986).

[16] *See Abramson* v. *Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

[17] The dissent of Chief Judge Mikva in the *KAL* case (cited in Pet. at 12) obviously cannot be used to establish a conflict, nor can the statement of the Second Circuit in *Tokio Marine & Fire Ins. Co.* v. *McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980). The court below said that the language in *Tokio Marine* quoted by plaintiffs (Pet. at 12) is "*dicta*," 928 F.2d at 1273, Pet. App. at A14, and it denied rehearing and rehearing *en banc* despite plaintiffs' contention that the decision in *Lockerbie* had improperly overruled *Tokio Marine*. Pet. App. at D1-D2. Finally, little weight should be given

In the first decision, *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982), the Ninth Circuit held that any recovery for wrongful death under state law was subject to the limitations on damages contained in the Warsaw Convention. The court was not faced with the question of whether the Convention creates the exclusive cause of action. Indeed, it was not until the second decision, *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983), that the Ninth Circuit, for the first time, held that the Warsaw Convention creates a cause of action. The court was not faced with the question of whether that cause of action was exclusive, for it explicitly declined to decide whether plaintiffs had viable state-law causes of action at all. 708 F.2d at 418. Finally, in *Johnson* v. *American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987), the Ninth Circuit dismissed a state-law action for damages as being in conflict with the Convention. There was thus no need to determine whether the Convention preempted even those state-law causes of action that are not in direct conflict with the Convention.

Sheris v. *Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, *cert. denied*, 409 U.S. 878 (1972), presented the issue whether an award under Virginia's workers' compensation law for the death of an employee killed in an air crash should be reduced by the amount of damages recovered from the airline in a Warsaw case. The court concluded that the workers' compensation award should be so reduced, rejecting the contention that the Warsaw recovery should be viewed as a recovery on an insurance contract, rather than a recovery from a tortfeasor. 188 S.E.2d at 368, 372-73. The Virginia court presumably would have reached the same conclusion whether or not the cause of action created by the Convention is exclusive.

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to inconsistent rulings of district courts that were not reviewed by the appropriate court of appeals. *E.g.*, *Rhymes* v. *Arrow Air*, 636 F. Supp. 737 (S.D. Fla. 1986).

In *dicta*, the Virginia court did state: "Numerous decisions establish that the Warsaw Convention does not create an independent right of action but only a presumption of liability leaving it for local law to grant the right of action." 188 S.E.2d at 370-71, *citing Noel* v. *Linear Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). But the reasoning of the *Noel* decision was later repudiated by its author, Judge Lumbard, in an opinion for the Second Circuit, and the federal courts of appeals have since uniformly held that the Convention does create a cause of action.[18] There is no reason to believe that the Virginia court would still follow the outdated statement of law quoted by petitioners.

In short, in the absence of a genuine conflict, there is no reason for the Court to grant review on the question of whether the Warsaw Convention creates the exclusive cause of action. When other appellate courts are actually faced with the issue, they may well agree with the Second and Fifth Circuits that the Warsaw Convention does create the exclusive cause of action.

2. *Alleged Conflict with This Court's Preemption Decisions.* Petitioners also contend that Second Circuit's decision on exclusivity and preemption "runs counter"

[18] The understanding of Article 17 reflected in *Noel* was changed by Judge Lumbard's opinion for the court in *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), which held that the Convention does create a cause of action cognizable in the U.S. district courts under federal-question jurisdiction. Since *Benjamins*, the Third, Fifth, Ninth and Eleventh Circuits have held that the Convention does create a federal cause of action. *See Abramson* v. *Japan Airlines Co.*, *supra*; *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, *supra*; *In re Mexico City Aircrash of Oct. 31, 1979*, *supra*; *St. Paul Ins. Co. of Illinois* v. *Venezuelan International Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987). This Court has implicitly agreed with these decisions. *See Floyd II*, 111 S. Ct. at 1492 n.2 (Court did not address theories of recovery claimed under state law, but rather "only the theory of recovery claimed under the Warsaw Convention").

to recent decisions of the Court that decline to preempt state tort laws. Pet. at 17-19. Whether such remedies are preempted depends upon the particular federal interest involved and upon congressional intent, either express or implied. None of the cited cases involved a federal treaty or statute that on its face modifies traditional state tort law remedies,[19] as the Warsaw Convention manifestly does. Thus, the decision below does not even vaguely or indirectly conflict with this Court's decisions.

In fact, the decision below is in harmony with this Court's decisions holding that three federal statutes relating to wrongful death and personal injury are exclusive of state law. *See, e.g., New York Central R.R.* v. *Winfield*, 244 U.S. 147, 149 (1917) (Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, enacted in 1908, preempts state-law workers' compensation claims); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155 (1964) (Jones Act, 46 U.S.C. app. § 688, enacted in 1920, preempts state-law wrongful death claims); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 233 (1986) (Death on the High Seas Act, 46 U.S.C. app. §§ 761-68, enacted in 1920, preempts state wrongful death laws for deaths occurring beyond the territorial waters).

In sum, the Second Circuit's holding that the Convention is exclusive was based on its conclusion that "[t]he

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[19] Plaintiffs cite four cases (Pet. at 18). *English* v. *General Electric Co.*, 110 S. Ct. 2270 (1990), held that a statutory prohibition on retaliatory discharge did not impliedly preempt state tort law remedies for such discharge. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), held that extensive regulation of the nuclear industry did not preempt state law claims for punitive damages when Congress clearly intended that tort actions could be brought. In neither case, had Congress expressly modified state tort laws. The other two cited cases did not involve tort law at all. *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), involved state antitrust laws, and *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), dealt with a local smoke ordinance.

existence of separate state causes of action conflicts so strongly with uniform enforcement of the Treaty" as to overcome any presumption against preemption. 928 F.2d at 1278, Pet. App. at A26. That reasoning is entirely consistent with the decisions of this Court that are cited in the preceding paragraph.

B. The Second Circuit's Decision Conforms to the Convention's Language and Negotiating History and to the Practices of Other Signatories.

Petitioners assert (Pet. at 14) that exclusivity is contrary to the "plain language" of Article 24 of the Convention which states in part: "[A]ny action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." 49 Stat. 3020. While petitioners' contend that this language permits only one interpretation, they ignore the Second Circuit's point that Article 24 is subject to two interpretations: "The first is that a local cause of action (actions 'however founded') may be brought, but that it is subject to the conditions and monetary limits of the Convention. The second interpretation is that a plaintiff, whatever his damages, cannot circumvent the Convention by bringing any action other than one under Article 17." 928 F.2d at 1282, Pet. App. at A36-A37.

The court below adopted the second interpretation of Article 24 when it held that the cause of action created by the Convention is exclusive. That construction is supported by the negotiating history, for a British delegate to Warsaw, Sir Alfred Dennis, said of Article 24: "It's a very important stipulation which touches the very substance of the Convention, because *this [provision] excludes recourse to common law* . . . ." Warsaw Minutes at 213 (emphasis added).

Finally, the practices of other contracting parties are to be given "considerable weight" in interpreting the Convention. *See Saks*, 470 U.S. at 404 (internal quotation

omitted). In recognition of the principle of exclusivity, the French courts have rejected efforts by plaintiffs to bring actions outside of the Convention.[20] So too, the 1932 British statute implementing the Convention made it the exclusive cause of action for a passenger's wrongful death,[21] as do the comparable statutes of Australia and Canada.[22] The court below rightly gave these practices substantial weight. *See* 928 F.2d at 1274, Pet. App at A16.

The fact that the Second Circuit's decision conforms to the Convention's language and negotiating history and is consistent with the practices of other signatories is an additional reason for denying certiorari in these cases.

C. The Second Circuit's Decision on Exclusivity Is Not of Sufficient Importance to Warrant Review by This Court in the Absence of a Genuine Conflict.

Petitioners contend that the Second Circuit's exclusivity ruling will have "wide-ranging consequences" because it means that all Warsaw Convention cases can be heard by the federal courts. Pet. at 11. This is not especially significant since plaintiffs in a Warsaw case previously were entitled to invoke the federal-question jurisdiction of the district courts by pleading the cause of action created by the Convention. Moreover, the airlines previously were entitled to remove to federal district court any interna-

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[20] *See* G. Miller, *Liability in International Air Transport* 235-39 (1977).

[21] Carriage by Air Act, 1932, 22 & 23 Geo. 5, ch. 36, § 1(4). The language on exclusivity was deleted when the British Parliament revised the statute in light of The Hague Protocol of 1955, *see* Carriage by Air Act, 1961, 9 & 10 Eliz. 2, ch. 27, "but there is no indication that any change of substantive law was intended." *Benjamins* v. *British European Airways*, *supra*, 572 F.2d at 919.

[22] *See* Civil Aviation (Carrier's Liability) Act, 1959-1973, § 12(2), 2 Austl. Acts P. 643, 645 (1974); Carriage by Air Act, § 2(5), Can. Rev. Stat., ch. C-26 (1979).

tional air disaster case where the Warsaw Convention cause of action was pleaded or where there was diversity of citizenship. The only effect of the exclusivity ruling is to permit airlines to remove from state courts those international disaster cases that plead only state-law causes of action and that lack diversity-of-citizenship jurisdiction, typically because suit has been brought in a state where the airline or a codefendant is incorporated or has its principal place of business. *See* 28 U.S.C. § 1441(b).

The Second Circuit also concluded that federal common law should supply the law in those instances where the Convention expressly leaves an issue to local law (928 F.2d at 1278-80, Pet. App. at A26-A30). Petitioners assert, without any authority, that the "elements of recoverable compensatory damages and the recipients of these damages" are "greatly affected" by whether they are governed by state law or by federal common law. Pet. at 11. In fact, the applicability of federal common law to determine who are the proper plaintiffs and what are elements of damages has been a possibility since the federal courts first recognized a decade or so ago that the Convention creates a federal cause of action. *See In re Mexico City Aircrash*, *supra*, 708 F.2d at 415 & n.27. We are aware of no litigation regarding a conflict between the federal and state law on who can sue and what compensatory relief is available.[23] Moreover, those two questions are not likely to be important so long as the Warsaw limitation remains in effect, for the parties will settle any serious claims for $75,000 rather than litigate such issues.

Finally, the exclusivity ruling is not even critical to the outcome of this case. Petitioners contend that the ruling

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[23] The only reported conflict of which we are aware involved a different issue. The Fifth Circuit in *Boehringer-Mannheim*, *supra*, held that Texas law regarding the recovery of attorneys' fees in lost freight cases should not be applied. 737 F.2d at 459. This Court denied certiorari. 469 U.S. 1186.

was a "necessary part" of the Second Circuit's decision to dismiss their claims for punitive damages, Pet. at 10, but the Eleventh Circuit in *Floyd I* (872 F.2d at 1482) and the District of Columbia Circuit in *KAL* (932 F.2d at 1486, 1488) have dismissed claims for punitive damages while explicitly declining to reach the exclusivity question.[24]

In short, there is no genuine conflict among the appellate courts as to whether the cause of action created by the Convention is exclusive, and the issue does not otherwise have such importance as to warrant review by this Court.

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[24] Thus, the *KAL* case does not present the exclusivity issue. Petitioners in *KAL* contend that the D.C. Circuit must have implicitly held the Convention to be the exclusive cause of action, on the theory that the Convention could otherwise not preempt federal maritime law, which they claim is of "equal stature" to the treaty. Pet. in No. 91-251, at 10-11. But this Court has held federal common law, including maritime law, is interstitial in nature and must give way, when inconsistent, to the enactments of Congress. *See Milwaukee* v. *Illinois*, 451 U.S. 304, 312-17 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Accordingly, the *KAL* court correctly held that any allowance of punitive damages in maritime common law must defer to the inconsistent scheme of the Warsaw Convention, a treaty approved by Congress, under which only compensatory damages can be awarded. In making that ruling, the *KAL* court was not required to decide whether the Warsaw Convention furnishes the exclusive cause of action.

CONCLUSION

For the foregoing reasons, the petition for certiorari in these cases (as well as the petition in No. 91-251, which raises the same issues) should be denied.

Respectfully submitted,

JAMES M. SHAUGHNESSY
ARTHUR E. HOFFMANN, JR.
WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, N.Y. 10019
(212) 237-1000

RICHARD M. SHARP *
FREDERICK C. SCHAFRICK
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Pan American World Airways, Inc.

* *Counsel of Record*

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